No. 15,962

United States Court of Appeals

For the Ninth Circuit

VUKA RADOVICH STEPOVICH, Executrix of the Estate of Mike Stepovich, deceased,
Appellant,

vs.

NICK KUPOFF, JAMES ZUKOEV, MIKE KITOFF, and NICK KABAK, a partnership doing business as North Star Mining Company,
Appellees.

REPLY BRIEF FOR APPELLANT.

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The Brief for Appellees filed herein merits little by way of response. It studiously avoids any discussion of the facts of record and makes no effort to point out in what respects Appellees' case is in any way sustained by evidence independent of their own testimony, as required by Section 61-13-4 of Alaska Compiled Laws Annotated (1949). Furthermore, the brief completely ignores several of the points raised in Appellant's opening brief (such as the inherent improbability of Appellees' testimony and the fact that it is contrary to the physical facts of record, the unsupportable size of the jury's verdict, and the weight to which such verdict is entitled), and these points must therefore be deemed to have been conceded.

Counsel for Appellant deem it necessary merely to re-emphasize the following in answer to the Brief for Appellees:

(1) APPELLEES WERE REQUIRED BY THE ALASKAN STATUTE TO PRESENT A PRIMA FACIE CASE INDEPENDENT OF THEIR OWN TESTIMONY IN ORDER TO OBTAIN A JUDGMENT AGAINST A DECEDENT'S ESTATE.

As pointed out at pages 12-15 of Appellant's opening brief, Section 61-13-4 of Alaska Compiled Laws Annotated was borrowed from a similar provision in the Oregon statute, which has been rigorously construed to require a claimant against a decedent's estate to present a complete prima facie case *independent of his own testimony.* Appellees' brief at pages 4-5 thereof suggests that all that is required is some corroboration of Appellees' testimony, and that such corroborative evidence need not itself be sufficient to support a judgment. As authority for this proposition, Appellees cite a Virginia case and a District of Columbia case. These cases were construing statutes which provided as follows:

> "In an action or suit by or against a person who, for any cause, is incapable of testifying, or by or against the * * * executor, administrator, heir or other representative of the person so incapable of testifying, no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony; * * *."
>
> Sec. 6209, Va. Code 1919 (now Sec. 8-286, 1950 Va. Code).
>
> "In any civil action * * * against the * * * representative of a deceased person * * * no judgment or decree shall be rendered in favor of the plaintiff founded on the uncorroborated testimony of the plain-

tiff * * * as to any transaction with or action, declaration or admission of the deceased * * * person; * * *."

D. C. Code Sec. 14-302.

These statutes merely precluded the rendition of a judgment against an estate founded on the *uncorroborated* testimony of an interested party. These statutes did not contain the more rigorous requirement of the Alaskan and Oregon statutes that a claim against an estate cannot be allowed except upon some competent or satisfactory evidence *other than the testimony of the claimant.* The distinction between these two types of statutes has been clearly recognized in an exhaustive annotation on the subject.

See

21 *A.L.R.* 2d 1013, 1017-18, 1022.

See also

21 Oregon Law Review, 218, 221 (1938).

It is clear that decisions construing the Virginia and District of Columbia type of statute have no application here.

Furthermore, Appellees failed to produce sufficient independent corroborative evidence to satisfy even the Virginia and District of Columbia type of statute. The lack of any reference in their brief to any such independent corroborative evidence in the Record clearly underscores that failure.

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(2) APPELLEES HAVE FAILED TO SHOW BY EVIDENCE INDEPENDENT OF THEIR OWN TESTIMONY THAT THEY WERE IN FACT DAMAGED AT ALL.

At pages 6-9 of their brief, Appellees cite certain cases for the proposition that difficulty of proof will not defeat

recovery where a plaintiff has shown that he has in fact sustained injury. However, these cases make clear that plaintiff must prove the *fact* of damage before he is entitled to prove the *amount* of damage. The fact that damage has resulted is one of the essential elements which a claimant against an estate must prove by independent evidence in order to obtain a judgment under the Oregon statute.

See

In re Fisher's Estate, 128 Ore. 415, 422, 274 Pac. 1098, 1100-1101 (1929).

In the present case Appellees have not proved by evidence independent of their own testimony that they were in fact damaged, as they have not proved by competent evidence that they had in fact discovered a valuable "pay streak". Indeed, the evidence of record in this case indicates that Appellees had been operating the mine at a loss prior to their removal from the premises, and hence the most that they were deprived of was the opportunity to continue to operate an unprofitable venture. Accordingly, the cases cited by Appellees are inapplicable.

Where a claimant has proved the *fact* of damage by independent evidence, a few isolated Oregon cases have permitted proof of the *amount* of damage without corroboration where the amount of damage was measured by the value of services rendered to an estate by a housekeeper or nurse, and where such value was capable of being fixed by opinion evidence which was (1) as readily accessible to the estate as it was to the claimant, and (2) as readily accessible to the executor as it was to the decedent in his lifetime.

See

Franklin v. Northrup, 107 Ore. 537, 552-3, 215 Pac. 494, 500 (1923);

Littlepage v. Security Savings & Trust Co., 137 Ore. 559, 3 P.2d 752 (1931);

In re Stoll's Estate, 188 Ore. 682, 696-7, 217 P.2d 595, 599 (1950).

Other Oregon cases have refused to recognize even this limited exception.

See

In re Pottratz Estate, 158 Ore. 625, 77 P.2d 436 (1938);

Jacobson v. Holt, 121 Ore. 462, 468, 255 Pac. 901, 903 (1927);

Wagner v. Savage, 195 Ore. 128, 139-40, 244 P.2d 161, 166 (1952).

Even those cases which have recognized the exception still recognize that all material elements of a claimant's cause of action, including fact of damage, must be proved by independent evidence, and at most merely permit a limited exception to the usual rule that a claimant must independently corroborate his estimate of value in those unique cases where the estate is laboring under no handicaps in producing rebuttal evidence. This limited exception would not have been applicable here even if Appellees *had* produced independent proof of the fact that they were damaged, as the evidence as to the results of Appellees' pannings and the actual worth—or worthlessness—of their supposed bonanza was not as readily accessible to Appellant as it was to Appellees, nor was such evidence

as readily accessible to Appellant as it presumably was to Mike Stepovich while he was alive.

See

Franklin v. Northrup, 107 Ore. 537, 553, 215 Pac. 494, 500 (1923).

If Appellees had in fact been deprived of a rich pay streak by Mike Stepovich, they had ample time to assert their claim during his lifetime when he presumably would have been able to testify as to the worth of their claim. Yet they did not even bother to counterclaim in the suit he had brought against them. Instead they chose to wait until after his death—long after they had left the premises—before filing their claim. The policy of the Alaskan and Oregon statutes precludes Appellees from delaying to assert their claim in such manner, and then using their own interested testimony—without any corroboration—to line their pockets at the expense of an estate.

For the reasons set forth in Appellant's opening brief, it is respectfully submitted that the judgment of the trial court should be reversed and the Appellees' complaint should be dismissed.

Dated, San Francisco, California,
November 5, 1958.

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